No. 00-589

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RAYMOND A. BERG, JR.,

Petitioner,

v.

COUNTY OF ALLEGHENY; ALLEGHENY COUNTY, ADULT PROBATION SERVICES; RICHARD R. GARDNER; GLENN ALLEN WOLFGANG; and GINNY DEMKO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS COUNTY OF ALLEGHENY, RICHARD R. GARDNER AND GINNY DEMKO

ERIC N. ANDERSON
Counsel of Record
S. ELAINE DIEDRICH
MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
Attorneys for Respondents County of Allegheny, Richard R. Gardner and Ginny Demko
2000 Frick Building
Pittsburgh, PA 15219
(412) 261-6600

163456

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

20pp

QUESTIONS PRESENTED FOR REVIEW

Pursuant to Supreme Court Rule 15, respondents object to the second question presented by petitioner which question is not before this Court. The averments made therein are not consistent with the proceedings below and states facts not part of the lower court findings in so much as neither the record, nor the findings of the courts below, support the averment that Mr. Gardner knew that an arrest warrant was erroneously issued and ignored same. Petitioner's second question presented states as follows:

> Has petitioner stated a § 1983 civil rights claim for violation of his protections under the Fourth, Fifth and Fourteenth Amendments which should have survived a motion for summary judgment, against Richard R. Gardner, a probation officer, who requested by way of an Arrest Warrant Information Sheet addressed to Ginny Demko, a criminal court clerk, that an arrest warrant be computer generated by her for Paul Banks for violation of his probation when, after determining that an arrest warrant was issued, but not for Paul Banks, then instructed Ginny Demko to issue another computer generated warrant but failed, at the same time, to direct her to retrieve the warrant issued in error and in failing to retrieve the errant warrant himself?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iii

Counterstatement of the Case 1

Reasons for Denying the Writ 7

I. The Petition Should Be Denied Because The Factual Questions Raised In The Petition Present No Compelling Reasons To Grant Certiorari. 7

II. The Petition Should Be Denied Because *Arizona v. Evans* Is Inapplicable To The Case *Sub Judice*. 13

III. The Petition Should Be Denied On Petitioners Second Question Presented As This Question Is Not Before This Court. ... 14

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizona v. Evans, 514 U.S. 1 (1995) 13, 14, 15

Brower v. County of Inyo, 489 U.S. 593 (1989) ... 7

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 8

Daniels v. Williams, 474 U.S. 327 (1986) 11

Farmer v. Brennan, 511 U.S. 825, 847 (1994) 10

United States v. Leon, 468 U.S. 897, 906 (1984) .. 13

Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560 (1971 13

United States Constitution:

Fourth Amendment 1, 7, 13, 14, 15

Fifth Amendment 1

Fourteenth Amendment 1, 11

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 ..... 1, 11

42 U.S.C. § 1985(3) 1

42 U.S.C. § 1988 1

Rule:

Supreme Court Rule 15 i

COUNTERSTATEMENT OF THE CASE

In this Petition for Writ of Certiorari, Raymond A. Berg, Jr., seeks review of a factual determination which has been consistently adjudicated in favor of Respondents, Virginia "Ginny" Demko and Richard R. Gardner, by the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit.

By Order dated September 23, 1998, the United States District Court for the Western District of Pennsylvania granted summary judgment in favor of the County of Allegheny and its employees, Ms. Demko and Mr. Gardner.[1] By Order dated July 17, 2000, the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. The Third Circuit affirmed the entries of summary judgment for Ms. Demko and Mr. Gardner, respondents herein. Also in the July 17, 2000, Order, the Third Circuit reversed and remanded for further proceedings, Mr. Berg's claims against the County of Allegheny. Mr. Berg now seeks review of the Third Circuit's affirmance of the summary judgment for Ms. Demko and Mr. Gardner.

Mr. Berg initiated the pending proceedings in an attempt to recover damages for false arrest, false imprisonment and violation of his rights to due process under the United States Constitution and the Fourth, Fifth and Fourteenth Amendments. Mr. Berg's cause of action is based on § 1983 and § 1988 of Title 42 of the United States Code and § 1985(3) of Title 43 of the United States Code.[2]

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1. The United States District Court determined that Allegheny County Adult Probation Services was one in the same as the County of Allegheny. The District Court dismissed Debbie Benton. There was no appeal taken from the dismissal of Debbie Benton.

2. On appeal, Mr. Berg only presses his Section 1983 claim.

It is undisputed that Mr. Gardner and Ms. Demko are state actors and were acting as such at all times relevant to the petitioner's cause of action. It is further undisputed that Mr. Gardner was a supervisor of probation officers employed by the County in the Adult Probation and Parole Department and Ms. Demko was employed at all times as a warrant clerk in the Criminal Division of the Court of Common Pleas of Allegheny County.

On October 30, 1990, Mr. Berg was sentenced to forty-eight hours of rehabilitation treatment pursuant to charges of driving under the influence of alcohol. When Mr. Berg was released on parole, Debbie Benton of the Allegheny County Probation and Parole Office was assigned as his parole officer. Mr. Berg eventually completed his term of parole in May of 1991.

On or about July 14, 1994, Mr. Gardner, a supervisor at the Allegheny County Probation and Parole Office, while reviewing his files, discovered that an individual by the name of Paul Banks was not complying with his probation requirements. Mr. Gardner completed a Warrant Request Form on July 14, 1994, which was signed by the Honorable Paul A. Lutty, Jr., of the Court of Common Pleas, Allegheny County, Pennsylvania. Pursuant to the Order of Judge Lutty, a request for an arrest warrant was issued in the form of a facsimile Arrest Warrant Information Sheet.

Mr. Gardner sent the facsimile Arrest Warrant Information Sheet to Ms. Demko, the warrant clerk responsible for issuing and clearing all arrest warrants in Allegheny County. The Arrest Warrant Information Sheet clearly indicates that Mr. Gardner requested that an arrest warrant be issued for Paul Banks, with criminal complaint

no. 9004165. On August 3, 1994, Ms. Demko generated the warrant using the County's computerized Integrated Court Information System (ICIS). The ICIS is operated by typing a criminal complaint number into the computer, which then automatically retrieves the remaining information and displays it on the user's screen.

Unfortunately, when Ms. Demko initially entered the criminal complaint number of Paul Banks, she inadvertently transposed two digits in Mr. Bank's criminal complaint number. Ms. Demko reversed the digits 4 and 1 so that the information brought up on the computer screen was actually that of the plaintiff, Raymond A. Berg, Jr. His criminal complaint number for his prior arrest was 9001465. Ms. Demko pressed a 1 and a 4 instead of a 4 and a 1 when she entered the criminal complaint number. Being that the names Berg and Banks were so similar, Ms. Demko, in checking the computer screen in her office, inadvertently did not notice the difference in the last names. As conceded by Mr. Berg in the proceedings below, Ms. Demko noticed only that the address on the screen was different from the address on the Information Sheet and did not realize that the other information was different as well. (*See* App. 3). Ms. Demko concluded only that the ICIS contained an old or otherwise incorrect address for Mr. Banks. In an effort to be efficient, she corrected what she believed to be the incorrect address on the warrant. This was the only change she made and a warrant was issued. She did not notice that the birth date, the social security number, the criminal charges, and the probation officer were all different from what appeared on the computer screen for Mr. Berg and what was set forth on the Arrest Warrant Information Sheet.

Mr. Berg lists the information provided on the facsimile Arrest Warrant Information Sheet; however, unlike Mr. Berg's Petition, this information was provided in a much different format. (*See* App 50). An exact copy of Paul Banks' Arrest Warrant Information Sheet is provided in the Appendix at page 50. This shows exactly what Ms. Demko saw and indicates the information was not as readily apparent as Mr. Berg portrays.

The warrant for the arrest of Mr. Berg inadvertently issued by Ms. Demko was forwarded to the Allegheny County Sheriff's Office where it was placed in a file with all of the other outstanding arrest warrants. Ms. Demko then date-stamped the Arrest Warrant Information Sheet for Mr. Banks, pursuant to the policies and procedures in effect at the time of the incident, and sent it back to Mr. Gardner.

Having received the Arrest Warrant Information Sheet with the date stamp on it indicating that it was received and completed by the warrant office in the courthouse, Mr. Gardner assumed that a warrant had been issued for the arrest of Mr. Banks pursuant to his request and the order of Judge Lutty. On August 15, 1994, Mr. Gardner was checking the computer system for the issuance of warrants and discovered that a warrant had not been issued for Paul Banks. He contacted Ginny Demko in the warrant office on August 16, 1994. He advised Ms. Demko that a warrant had not been issued for Mr. Banks. Not knowing that an erroneous warrant had been issued, Mr. Gardner called Ms. Demko on August 16, 1994, and merely informed her that no warrant for Mr. Banks had been issued. Ms. Demko generated a warrant for his arrest on that same date. Mr. Gardner corrected the date on the original Arrest Warrant Information Sheet and initialed it, indicating that a warrant had now been issued for the arrest of Mr. Banks.

Constable Glenn Allen Wolfgang, an independent contractor and a duly elected constable from the Borough of Manor in Westmoreland County, picked up the warrant in the Sheriff's Office and arrested Mr. Berg on December 30, 1994. Mr. Berg was thereafter taken to the Allegheny County Jail and, after proper processing, was placed in the jail. He was released on January 3, 1995.

Mr. Gardner first became aware that Mr. Berg was lodged in the Allegheny County Jail as a probation and parole violator when Peggy Viola, a clerk in the Probation and Parole Office, checked the jail list on January 3, 1995, and noticed that Mr. Berg was being housed in the jail as a result of a violation of a probation/parole warrant. Ms. Viola brought Mr. Berg's case to the attention of Mr. Gardner. Immediately upon checking the system and determining that there was no warrant issued for the arrest of Mr. Berg, Mr. Gardner made arrangements to have Mr. Berg released from jail, which occurred on January 3, 1995. Soon thereafter, he contacted Ms. Demko to advise her that she had issued an erroneous warrant. This was the first time Ms. Demko learned of her mistake.

There is no question that the warrant issued for the arrest of Mr. Berg was a mistake which was the result of Ms. Demko inadvertently reversing the digits 4 and 1 in the criminal complaint number of Mr. Banks. Ms. Demko testified that she has been employed as a warrant clerk since 1989 and that she issues approximately 500 warrants a month, which means that she had issued approximately 55,000 warrants at the time of her deposition on December 17, 1997. During that entire period of time, she was using the same computer system that was in place in August of 1994, when she made the mistake with respect to the warrant issued for

the arrest of Mr. Berg. She testified that this was the only occasion where there was ever a mistake made in the warrant office which resulted in an arrest warrant being issued for someone other than the person for whom it was intended to be issued. Ms. Demko acknowledged she "made a mistake, a clerical mistake," one that had never occurred during the process of issuing over 55,000 warrants and one which has never occurred since this incident.

Mr. Gardner testified that when he first learned of the error on January 3, 1995, he did not think that Ms. Demko could have made the mistake because she was "just too good and too thorough." Mr. Gardner testified that at that time he may have thought that Ms. Demko was on vacation, as it was the summer months, and that her replacement had stamped the Information Sheet but had failed to issue the warrant.

Mr. Gardner, by his deposition, testified repeatedly that he did not know that a warrant had been erroneously issued until January 3, 1995. Mr. Gardner testified that the first time he had notice that a wrong criminal complaint number had been utilized was on or after January 3, 1995. When he contacted Ms. Demko by telephone on August 16, 1994, he only advised her that despite the date stamp on the warrant, the warrant did not appear on the computer system, ICIS. He did not advise Ms. Demko that an erroneous warrant had been issued as he did not know that an erroneous warrant had been issued until much later, January 3, 1995. During Mr. Gardner's deposition, petitioner's counsel inquired of Mr. Gardner, "but you did know that a warrant was issued on that date [August 6, 1994] for someone?" Mr. Gardner responded, "No, I did not. . . . I definitely did not know that a warrant was issued for anyone."

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE FACTUAL QUESTIONS RAISED IN THE PETITION PRESENT NO COMPELLING REASONS TO GRANT CERTIORARI.

Petitioner seeks review of a factual determination that has been consistently adjudicated by the District Court and the Third Circuit in favor of Respondents, Ms. Demko and Mr. Gardner. (*See* App. 21, 46). Both the District Court and Third Circuit held that the record did not present sufficient evidence from which reasonable jurors could conclude that Ms. Demko or Mr. Gardner intentionally caused Mr. Berg's arrest or acted with "deliberate indifference." (*See* App. 21, 22, 43-46). Thus, the lower courts clearly held that the evidence of record did not support Due Process or Fourth Amendment claims against Ms. Demko or Mr. Gardner.

It is well settled that unintended conduct cannot form the basis of a Fourth Amendment violation. *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Brower*, the driver of a stolen automobile was killed at the end of a high speed chase when his vehicle collided with a truck that police had positioned to serve as a roadblock. This Court held that the use of the roadblock constituted a seizure for purposes of the Fourth Amendment. This Court further held that a violation of the Fourth Amendment requires an intentional acquisition of physical control: "In sum, the Fourth Amendment addresses 'misuse of power' . . . not the accidental effects of otherwise lawful conduct." *Brower*, 489 U.S. at 596 (citation omitted).

To avoid summary judgment under the Fourth Amendment analysis, Mr. Berg must point to some evidence

from which a reasonable jury could conclude that respondents intentionally caused his arrest. As held by both the District Court and Third Circuit and supported by the record evidence, he has failed to do so.

In the proceedings below, Berg conceded that Ms. Demko failed to notice that her computer screen displayed his name, rather than Banks', when she mistakenly transposed the criminal complaint number on the Warrant Information Request Sheet. (*See* App. 20). The Third Circuit found this integral to its determination that Ms. Demko did not act intentionally to cause Mr. Berg's arrest.

With respect to Mr. Gardner, the Third Circuit further held that "Berg points to no record evidence that Gardner intentionally caused his arrest." (*See* App. 21). Although Mr. Gardner initiated the series of events that ultimately led to Mr. Berg's arrest, his only role was to request a warrant for Mr. Banks. He did not play any part in issuing the erroneous warrant for Mr. Berg or in the Constable's arrest of Mr. Berg. Nothing in the record indicates that Mr. Gardner intended to cause Mr. Berg's arrest; he only intended to cause Mr. Banks' arrest. (*See* App. 21).

Where a government official acting under the color of law does not intentionally cause the plaintiff to be seized, but is nonetheless responsible for the seizure, it may be that a due process "deliberate indifference" analysis is appropriate. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998). The Third Circuit determined that Mr. Berg also failed to show Ms. Demko acted with "deliberate indifference" under the due process analysis. "Berg has not alleged anything more than mere negligence on Demko's part." (*See* App. 20).

Mr. Berg's argument that Ms. Demko and Mr. Gardner acted with "deliberate indifference" is premised on the illusory fact that Ms. Demko and Mr. Gardner *knew* that a warrant was erroneously generated in August of 1994. Mr. Berg similarly raised this argument in the Third Circuit. There, the court clearly held that, on the contrary, the evidence of record, including the depositions of both Ms. Demko and Mr. Gardner, did not present evidence from which a reasonable juror could conclude that either party knew the warrant was erroneously issued. The Third Circuit stated:

> Berg claims, however, that Demko acted with deliberate indifference because she failed to take any steps to recall the erroneously issued warrant when Gardner "informed her of [her mistake] on August 16, 1994." When Gardner called Demko on August 16, he merely informed her that no warrant for Banks had been issued. He did not inform her that she had issued an erroneous warrant until approximately January 3, 1995, several days after Berg had been arrested. . . . *There is nothing in the record indicating that Demko was aware of her error at any earlier date.* She could not have been deliberately indifferent to a risk of which she was reasonably unaware. (*See* App. 20-21) (internal citations omitted) (emphasis added).

Similarly, the District Court stated:

> While Berg makes passing reference to "wantonness" and "deliberate indifference," he does not provide any substantive analysis. . . .

> *Berg did not elicit any testimony from Demko that she knew of her mistake, and that she failed to take advantage of reasonable methods of correcting the mistake.* . . . In the absence of any such evidence, I agree that reasonable jurors could only find that Demko's conduct, though resulting in great misfortune, amounted to no more than negligence. (*See* App. 45-46).

With respect to Gardner, the Third Circuit also found no evidence of record that he either intentionally caused Mr. Berg's arrest or acted with the requisite "deliberate indifference" for a due process violation. The court found:

> Again, however, Berg argues that Gardner could be held liable under a due process theory of deliberate indifference. He contends that Gardner displayed such indifference when he failed "to act on his 'hunch' that perhaps an erroneous warrant did, in fact, issue." It is worth noting, however, that the record does not establish any such "hunch" on Gardner's part. (*See* App. 22) (internal citations omitted).

Even assuming that Mr. Gardner realized that a bad warrant had been issued, the Third Circuit determined that the evidence revealed that no reasonable measures were available to Mr. Gardner to reduce or eliminate any serious risk of harm. (*See* App. 22) (*citing Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that "a prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it.*") (emphasis added).

Further, this Court has made very clear the basis for the rule that more than mere negligence is necessary to support a Constitutional violation. In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court discussed in very specific terms the distinction between negligent conduct of state officials and the conduct which amounted to an arbitrary exercise of power which resulted in a harm which rose to the level of a Constitutional violation. Although this Court was confronted with a factual situation dissimilar to that presently before the Court, the general principles discussed are certainly applicable to the facts of this case.

In *Daniels*, the plaintiff slipped on a pillow negligently left in a stairway by the respondent's sheriff's department. The plaintiff in *Daniels* filed a Complaint that the conduct of the sheriff's deputies deprived him of his liberty interest and freedom of bodily injury without due process of law within the meaning of the due process clause of the Fourteenth Amendment.

This Court reasoned "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a mere negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' " *Daniels*, 474 U.S. at 330. The court further reasoned that where a government official's act causing injury to the life, liberty or property is merely negligent, "no procedure for compensation is constitutionally required." *Daniels*, 474 U.S. at 333. Thus, it is clearly established that lack of due care on the part of a state official does not state a cognizable claim under Section 1983.

In the case *sub judice*, the District Court as well as the Third Circuit held that Ms. Demko's actions amounted to nothing more that mere negligence. The District Court held that reasonable jurors could only find that Demko's conduct amounted to "no more than negligence." (*See* App. 46). Similarly, the Third Circuit, after analyzing the evidence of record, determined that Berg had alleged nothing more than "mere negligence" by Ms. Demko. (*See* App. 20).

Unlike petitioner's assertions, this is not a case where respondents are absolving themselves from liability by saying "it was the computer not me." Rather, Ms. Demko has acknowledged that it was her mistake that caused the erroneous warrant to be issued. Further, after reviewing the facts in evidence, both lower courts concluded that Ms. Demko's actions were merely negligent.

In his Petition, Mr. Berg cites to the "lower courts' evaluation of the testimony" and outlines six (6) factual findings. However, a review of the lower court opinions reveals that many of the findings set out by Mr. Berg were, in fact, *never* made by the lower courts. Mr. Berg's assertions that Ms. Demko knew she had issued the warrant and "deceitfully" failed to reveal that fact to Mr. Gardner are not, in any manner, supported by the lower court opinions. On the contrary, both the District Court and Third Circuit determined that such allegations were simply not supported by the record. Mr. Berg provides no citations to the lower court opinions to support that these are, in fact, the "lower courts' evaluation of the testimony." Respondents are bewildered as to the basis for these representations. It appears that many of these allegations are merely bald assertions on the part of Mr. Berg.

II. THE PETITION SHOULD BE DENIED BECAUSE *ARIZONA v. EVANS* IS INAPPLICABLE TO THE CASE *SUB JUDICE*.

Petitioner discusses and uses passages from Justice Ginsberg's dissenting opinion in *Arizona v. Evans*, 514 U.S. 1 (1995), in support of his claim that Certiorari should be granted. Mr. Berg raises *Arizona* presumably for the purpose of establishing that today's widespread use of computer systems in the field of law enforcement create the potential for human error. However, Mr. Berg's reliance on *Arizona* does not support his position that the Third Circuit erred in granting summary judgment in favor of Ms. Demko and Mr. Gardner. *Arizona* bares no application to the issue of whether these government officials acted intentionally or with "deliberate indifference" in their actions.

Arizona dealt exclusively with the application of the exclusionary rule in cases where a mistake was made by an operator of a minor judiciary's computer system. This Court held that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment where the erroneous information resulted from a clerical error of court employees.

The *Arizona* Court discussed the case of *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971). In *Whiteley*, this Court "treated the identification of a Fourth Amendment violation as synonymous with the application of the exclusionary rule to evidence secured incident to that violation." *Arizona*, 514 U.S. at 13 (citing *Whiteley*, 401 U.S. at 568-569). However, the *Arizona* court stated that "later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated." *Arizona*, 514 U.S. at 13 (citing *United States v. Leon*, 468 U.S. 897, 906 (1984)).

Therefore, *Arizona* has no bearing on this case where Mr. Berg is claiming a violation of his Fourth Amendment rights, rather than arguing application of the exclusionary rule.

III. THE PETITION SHOULD BE DENIED ON PETITIONERS SECOND QUESTION PRESENTED AS THIS QUESTION IS NOT BEFORE THIS COURT.

The second question presented by Mr. Berg states facts not consistent with the proceedings below and is not before this court. Specifically, neither the record, nor the findings of the courts below, support the averment that Mr. Gardner *determined* that an arrest warrant was erroneously issued prior to his instructions to Ms. Demko on August 16, 1994, to issue another warrant for Paul Banks. Rather, the proceedings below revealed, consistent with the deposition of Mr. Gardner, that Mr. Gardner did not determine that another warrant had erroneously been issued until January 3, 1995, when he was advised that Mr. Berg was in jail. On this additional basis, the Petition should be denied as to the second question presented by Mr. Berg.

CONCLUSION

The United States Court of Appeals for the Third Circuit and the District Court for the Western District of Pennsylvania both concluded that based on the facts of record, a reasonable jury could not find that Ms. Demko or Mr. Gardner acted intentionally or with "deliberate indifference" so as to hold them liable under the Fourth Amendment or Fourth Amendment. Further, *Arizona v. Evans* is inapplicable to this case which deals with an alleged violation of the Fourth Amendment, not the exclusionary rule. Finally, petitioners second question presented is not before this court and, therefore, the petition should be denied as to this question on this basis as well.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERIC N. ANDERSON
Counsel of Record
S. ELAINE DIEDRICH
MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK, P.L.L.C.
Attorneys for Respondents
County of Allegheny,
Richard R. Gardner
and Ginny Demko
2000 Frick Building
Pittsburgh, PA 15219
(412) 261-6600